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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/310,965	05/13/1999	STAN SCHALL JR.	156.0001	9612

25534 7590 05/14/2002

CAHN & SAMUELS LLP
2000 P STREET NW
SUITE 200
WASHINGTON, DC 20036

EXAMINER

YU, JUSTINE ROMANG

ART UNIT	PAPER NUMBER
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3764

DATE MAILED: 05/14/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/310,965

Applicant(s)

SCHALL, STAN

Examiner

Justine R Yu

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) 5, 11, 12 and 17-20 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 4, 10, 13 and 14 is/are allowed.
- 6) ☐ Claim(s) 1-3, 6-9, 15, 16 and 21 is/are rejected.
- 7) ☒ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on ____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) ____
- ☐ Interview Summary (PTO-413) Paper No(s). ____
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other:

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DETAILED ACTION

1. This office action is responsive to the amendment filed on 2/19/02. As directed by the amendment, claim 13 was amended, no claim was canceled nor added. Thus, claims 1-21 are presently pending in this application.

2. Claims 5, 11, 12 and 17-20 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected species, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in Paper No. 10.

Claim Rejections - 35 USC § 112

3. Claims 2 and 15 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 2, lines 2-3 "with the horizontal plane" is not clear as how and by what structural element being used to define the horizontal plane.

In claim 15, line 3, "said bottom surface" lacks antecedent basis.

Claim Rejections - 35 USC § 102

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

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5. Claim 15 is rejected under 35 U.S.C. 102(b) as being anticipated by Thomas, Jr. (4,768,778).

Thomas teaches an exercising device having an upper platform 34, a ^{first} pad 88, a lower housing (36, 22, figure 3 and 5), a lower housing cap 44, a bearing element 48, and a regulating components 98.

Claim Rejections - 35 USC § 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over Thomas, Jr..

Thomas in figure 9 shows a stopper (110, 114), the upper platform including a wall extending downwardly from a peripheral edge of a recess formed in the center of the upper platform, the wall has an opening passing therethrough, and the lower housing including an opening passing therethrough.

Figure 9 of Thomas differs from the present invention in that figure 9 of Thomas has bearing raceways (104, 118) rather than housing caps. However, the feature of choosing housing caps rather than raceways is considered as an obvious design choice, see the housing caps 38, 44 in figure 3 of Thomas.

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8. Claims 1-3 and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Thomas, Jr. in view of Montgomery (5,226,868) and Karstadt (Des. 141,456).

Thomas in figures 2 and 3 shows an upper platform (34, 88, 38) and a handle 26 supported by an upright (figure 2). Thomas's push-up device differs from the present invention in that Thomas's handle has a different shape rather than a handle having a short upright portion and a tall upright portion. However, Montgomery teaches a push-up device having a handle including a short upright portion 86, a tall upright portion 84, a gripping area 88 joint to the upright portions with elbows, see figure 6 of Montgomery. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Thomas's handle with a short upright portion, a tall upright portion, and a gripping area with elbows as taught by Montgomery, in order to provide an inclined support to the user.

The modified Thomas's gripping area lacks a tapered configuration such as tapered from the short upright portion to the tall upright portion. However, Karstadt teaches a handle including a tapered gripping area tapered from the proximal portion of the handle to the distal portion of the handle (figures 1 and 2). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the modified Thomas's handle with a tapered gripping area as taught by Karstadt, so as to be able to manipulate the device more easier.

In addition, applicant is reminded that a change in the shape of a prior art device is a design consideration within the skill of the art. In re Dailey, 357 F. 2D 669, 149 USPQ 47 (CCPA 1966). Applicant must provide persuasive evidence to prove that the particular configuration of the claimed handle shape is significant.

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Regarding claim 2, figure 6 of Montgomery shows the gripping area having an angled bottom and an arch 90. Montgomery lacks a detail description that the gripping area including a bottom angled at fourteen degrees with the horizontal plane. The feature of choosing a particular angle, i.e., fourteen degrees with the horizontal plane is considered as an obvious design choice since it appears that the modified Thomas's device would perform equally well with a fourteen degree angled gripping area. In addition, the feature of choosing a particular shaped tall upright portion, i.e., tapered out from the gripping area to the upper platform is considered as an obvious design choice since such shaped upright portion is well known in the art. See figure 2 of Karstadt's reference.

Regarding claim 21, the modified Thomas's reference lacks a description of a particular way to hold the handle such as by placing the pinkie of the user's hand on the gripping area near the tall upright portion. However, such method of holding the gripping area is considered as an obvious design choice. In addition, the modified Thomas's device has the same structure as claimed. If one of ordinary skill in the art, i.e., an exerciser, upon seeing the modified Thomas's device desired to perform the push-up exercise with various difficulty levels, one would have looked to the modified Thomas's device and seen that by holding the handle differently, i.e., placing the pinkie near the tall upright portion, would be able to provide varied difficulty levels of exercises.

9. Claims 6, 7, and 9 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Hovda (1,533,500).

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Hovda teaches an exercise device having an upper platform 1, lower housing 2, the lower housing including a floor with a hole 4 passing therethrough, see teaching on page 1, lines 54-58 and figure 1, a lower housing cap 12, a bearing element 22, and regulating components (21, 19, 20) including adjustment mechanism 21 (nut, see teaching on page 1, lines 81-83).

Hovda has a dust plate covering the hole 4 while the present invention does not have a dust plate. The feature of choosing not to have the dust plate is considered as an obvious design choice because the omission of an additional element and its function is obvious if the function of the element is not desired.

Regarding claim 7, notes the friction material 19 which including threads for engaging the nut 21.

Regarding claim 9, figure 1 of Hovda shows the recited structure.

10. Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hovda in view of Titus (2,256,001).

Hovda lacks a footing attached to the lower housing. However, Titus teaches a footing 11 being attached to the lower surface of the lower housing. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide Hovda's device with footing as taught by Titus, in order to prevent the device from slipping on the floor or support.

Allowable Subject Matter

11. Claims 4, 10, 13, and 14 are allowable over the prior art of record.

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12. The indicated allowability of claim 16 is withdrawn in view of the reference(s) to Thomas, Jr.. The examiner apologized for the inconvenience.

Response to Arguments

13. Applicant's arguments filed 2/19/02 have been fully considered but they are not persuasive.

In response to applicant's argument that Karstadt is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, a person of ordinary skill in the art could have readily appreciated that the combined Thomas and Montgomery reference could have a tapered gripping portion in view of Karstadt teaching.

14. Applicant's arguments with respect to claims 1-3, 6-9, 15, and 21 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion


15. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Vogt (3,454,273) and Saunders (2,351,293) are cited to show different exercisers.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Justine R Yu whose telephone number is (703)308-2675. The examiner can normally be reached on 8:30am - 6:00Pm.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703)308-0858.


Justine R Yu
Primary Examiner
Art Unit 3764

JYU
May 10, 2002